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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1994

CITY OF EDGERTON,
AND EDGERTON SAND & GRAVEL, INC.,

*Plaintiffs-Respondents-Petitioners,*

[Caption Continued]

**Joint Petition on Behalf of City of Edgerton and Edgerton Sand & Gravel, Inc. For Writ of Certiorari to the Supreme Court of the State of Wisconsin**

# JOINT REPLY BRIEF OF CITY OF EDGERTON AND EDGERTON SAND & GRAVEL, INC.

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BEST AVAILABLE COPY

v.

GENERAL CASUALTY COMPANY OF WISCONSIN,

*Defendant-Appellant-Respondent,*

WISCONSIN INSURANCE SECURITY FUND,

*Defendant,*

AETNA CASUALTY AND SURETY COMPANY,

*Defendant-Co-Appellant-Respondent,*

HANOVER INSURANCE COMPANIES,
WAUSAU INSURANCE COMPANIES,
AND LOCAL GOVERNMENT PROPERTY
INSURANCE FUND,

*Defendants.*

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42 U.S.C. § 9607(a)(4)(C) . . . . . 1, 6

**Other Authorities**

43 CFR § 11.80(b), 59 Fed. Reg. at 14283 . . . . . 6

Kristin A. Kolesar, Note, Insurance Coverage for CERCLA Claims Under Comprehensive General Liability Policies: Cleaning Up Hazardous Waste In the Legal Environment, 68 Notre Dame L. Rev. 549 (1993) . . . . . 2, 4

## REPLY BRIEF

### I. THIS COURT SHOULD GRANT THE PETITION TO CORRECT THE WISCONSIN SUPREME COURT'S MISCONSTRUCTION OF FEDERAL LAW IN HOLDING THAT CERCLA RESPONSE COSTS WERE SOLELY EQUITABLE RELIEF WHICH DO NOT CONSTITUTE DAMAGES.

A federal question meriting review by this Court is presented when the highest court of a state undertakes to construe federal statutes according to its determination of what Congress intended, and misconstrues the federal statutes contrary to prior decisions of this Court and the circuit courts of appeals. Supreme Court Rule 10.1(c).

The issue before this Court is the Wisconsin Supreme Court's construction of 42 U.S.C. § 9607(a)(4)(A) to constitute solely equitable relief which does not include damages. The insurers incorrectly assert that the Wisconsin Supreme Court's decision was merely an interpretation of state insurance law. The decision itself, the reasoning underlying the decision and the insurers' own arguments in response to the petition, all establish that this case revolves upon a critical question of federal law which desperately requires a national, uniform construction by this Court.

To reach its decision, the Wisconsin Supreme Court distinguished between the relief available under two subsections of § 9607. The court contrasted between relief for response costs pursuant to § 9607(a)(4)(A), which it construed to be equitable, with relief for natural resources pursuant to § 9607(a)(4)(C), which it construed to be damages. This is the construction of a federal statute and involves an important question of federal law which warrants review by this Court.

Despite the insurers' repeated attempts to characterize the question before this Court as merely a matter of state insurance law, the Wisconsin Supreme Court clearly perceived this as a matter of federal law. The Wisconsin Supreme Court recognized as much when it declared:

> Response costs assigned either under CERCLA or secs. 144.442(8) and (9), Stats., are, by definition, considered to be equitable relief and reflect a congressional intent to differentiate between cleanup or response costs under 42 U.S.C. sec. 9607(a)(4)(A) and damages for injury, destruction, or the loss of natural resources under 42 U.S.C. sec. 9607(a)(4)(C). See Insurance Coverage for CERCLA Claims, 68 Notre Dame L. Rev. at 561.

(A.Ap. at 137; emphasis added.) There can be no question that in determining congressional intent, the Wisconsin Supreme Court realized it was construing a federal statute. The unequivocal language of the decision establishes the lack of merit to the insurers' contention that this merely involves a matter of state insurance law.

The Wisconsin Supreme Court's reliance upon federal law as a basis for its decision is underscored by its reliance upon a student note, Kristin A. Kolesar, Note, Insurance Coverage for CERCLA Claims Under Comprehensive General Liability Policies: Cleaning Up Hazardous Waste In the Legal Environment, 68 Notre Dame L. Rev. 549 (1993) (hereinafter Kolesar). The Court cited this article several times throughout its opinion, extensively relying upon its analysis. (A.Ap. at 135-37.) Interestingly, the insurers do not cite this article upon which the Wisconsin Supreme Court so heavily relied. The reason is that an examination of the article reveals that it, like the Wisconsin Supreme Court, relied upon congressional intent and a construction of

CERCLA to conclude response costs are not damages. Kolesar, 68 Notre Dame L. Rev. at 561-64 (citing and referring repeatedly to CERCLA's statutory language and congressional intent).

More importantly, the Kolesar note recognizes that this Court's decision in Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 1 (1989) is contrary to the author's interpretation of CERCLA and attempts to distinguish that decision. The note rationalizes the decision as follows:

> In Independent Petrochemical Corp. v. Aetna Casualty & Surety Co. [944 F.2d 940 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1777 (1992)], the District of Columbia Circuit attempted to discredit the notion that the separation of the provision into damages and equitable relief evinces congressional intent. The court rejected the insurer's argument that the language of CERCLA necessarily corresponds with a construction of "damages" that does not include liability for the government's cleanup costs. The court cited for support the case of Pennsylvania v. Union Gas Co., in which the Supreme Court characterized section 9607 as providing "liability in damages" and concluded that CERCLA "'hold[s] States liable in damages in federal court.'" However, the Supreme Court never stated, either explicitly or implicitly, that damages are the exclusive remedy available under section 9607. Therefore, the Supreme Court's interpretation does not contradict the notion that congressional intent to distinguish between equitable relief and legal damages is manifested by section (4)(A) and section (4)(C), respectively.

Kolesar, 68 Notre Dame L. Rev. at 463-64 (emphasis added).

This Court's decision in Union Gas Co. is applicable to the present case. The only relief sought by the respondent in Union Gas Co., as established by the Joint Petition at 11-12 and not contested by the insurers, was response costs pursuant to § 9607(a)(4)(A). This Court repeatedly declared this relief was damages. Union Gas Co., 491 U.S. at 7, 12-13. Kolesar's argument to the contrary and the Wisconsin Supreme Court's reliance on the note are simply wrong. The District of Columbia Circuit recognized the applicability of Union Gas Co. to the precise issues decided by the lower court in this case:

> Moreover, courts that have interpreted CERCLA do not seem to distinguish governmental cleanup costs from "damages." The Supreme Court characterized section 107 as providing "liability in damages," and concluded that CERCLA "hold[s] States liable in damages in federal court." Pennsylvania v. Union Gas Co., 491 U.S. 1, 12, 13, 109 S. Ct. 2273, 2280, 2281, 105 L. Ed. 1 (1989).

Independent Petrochemical, 944 F.2d at 947.

Contrary to the insurers' assertions, the District of Columbia Circuit clearly believed this Court's decision in Union Gas Co. was applicable and relied upon it to reject the assertion that CERCLA response costs were merely equitable relief as a matter of congressional intent and federal law. Indeed, the District of Columbia and Eighth Circuits have reached contrary conclusions on the issue before this Court, with respect to the same state, Missouri. Compare Independent Petrochemical Corp., 944 F.2d at 944-47 with Continental Ins. v. Northeastern Pharmaceutical & Chemical Co., Inc., 842 F.2d 977, 987-90 (8th Cir.) (en banc), cert.

denied sub nom. Missouri v. Continental Insurance Cos., 488 U.S. 821 (1988). The District of Columbia Circuit went on to cite numerous other federal decisions construing CERCLA response claims to constitute damages, including its own previous decision in Ohio v. United States Dep't. of Interior, 880 F.2d 432, 459 (D.C. Cir. 1989) (cost of restoration is proper measure of damages in natural resource recovery actions pursuant to § 9607(a)(4)(C)). Id.

The insurers assert that Union Gas Co. has no applicability since the issue involved Eleventh Amendment immunity. In assessing the extent of the immunity, however, this Court determined that the issue involved the assessment of damages against the State as opposed to mere equitable relief. The insurers can not dispute that the manner in which this Court characterized response costs in Union Gas Co. was totally contrary to how the Wisconsin Supreme Court construed response costs in the present case for the identical federal statute.

The insurers rely upon Exxon Corp. v. Hunt, 475 U.S. 355 (1986), a case they relied upon in their briefs to the Wisconsin Supreme Court. The Wisconsin Supreme Court did not rely upon Exxon Corp., apparently recognizing what the insurers ignore. Exxon Corp. involved a pre-emption issue concerning the expenditure of federal monies pursuant to Superfund. Exxon Corp., 475 U.S. at 360-61. The issue was whether New Jersey, pursuant to its own spill compensation and control act, could tax the petitioners for a separate state fund to clean up hazardous waste sites also covered by Superfund. Id. Whether the Superfund monies may be used to compensate third parties for injuries is irrelevant as to whether response costs are damages which a third party is required to pay to clean up a hazardous site.

This Court's recent decision in Key Tronic Corp. v. United States, ___ U.S. ___, 114 S. Ct. 1960, 128 L. Ed. 2d

797 (June 6, 1994), demonstrates that response costs are treated as damages by allowing contribution claims between PRPs for those costs other than attorneys fees. An implied right of contribution makes no sense unless the case involves joint and several liability for damages, rather than equitable relief. The insurers have no response to the fact that this Court has consistently treated response costs as damages whenever it has been required to construe CERCLA.

The fallacy of the insurers' argument is further shown by what is included in the measure of damages for natural resource recoveries pursuant to § 9607(a)(4)(C). The Wisconsin Supreme Court conceded that these did constitute damages pursuant to its narrow definition. (A.Ap. at 137.) The insurers also agree that natural resource recoveries are damages. (General Casualty Brief at 11.) The insurers argue that response costs really are not a part of § 9607(a)(4)(C); this is untrue. The measure of recovery pursuant to § 9607(a)(4)(C), which everyone agrees is damages, however narrowly defined by the Wisconsin Supreme Court, includes precisely the same costs, for the same activities, administered in the same manner. 43 CFR § 11.80(b), 59 Fed. Reg. at 14283. This was the linchpin of the court's decision in Ohio v. United States Dep't of Interior, 880 F.2d at 441-59. The District of Columbia Circuit recognized as much when it relied on the Ohio case in holding response costs were damages in Independent Petrochemical, 944 F.2d at 947.

It makes no sense to include as "damages" costs of restoring natural resources which are identical to response costs but declare, as a matter of federal law, response costs are not "damages." In essence, the insurers are asserting that the same dollars to do the same thing are "equitable dollars" if expended pursuant to § 9607(a)(4)(A) but "damages dollars" if expended pursuant to § 9607 (a)(4)(C). Certainly, the dollars themselves carry no such label, and subsections of § 9607(a)(4) carry no such label either.

It is also critical to note that while the insurers adamantly claim there is no issue of federal law in the present case, in General Casualty's argument that the Wisconsin Supreme Court correctly construed response costs, pages 10-17 of General Casualty's brief in opposition, it repeatedly relies upon Continental Ins. Co., 810 F.2d at 749. Continental Ins. Co. resolved the same question as the present case, and was one of the two cases from other jurisdictions cited by the Wisconsin Supreme Court. (A.Ap. at 133-39.) Continental Ins. Co. is cited by General Casualty as authoritative for the proposition of federal law:

> Federal courts have consistently held response costs actions under CERCLA are equitable actions invoking injunctive and restitutionary relief and do not constitute actions for legal damages.

General Casualty Brief at 12 (footnote omitted). The insurer's reliance on this case as an authoritative interpretation of federal law establishes without question that the real issue here is an interpretation of federal law.

The issue in the present case is the proper construction of § 9607(a)(4)(A) of the United States Code, not the interpretation of state contract and insurance law. This Court and numerous federal circuit courts have construed and treated this relief to constitute a damages remedy, as opposed to a purely equitable remedy. This is a question of federal law, a question which has divided the circuits, even as to the same state of Missouri, and a question this Court needs to resolve.

## II. A PROPER CONSTRUCTION OF § 9607(a)(4)(A) IS A SUBSTANTIAL NATIONAL CONCERN WHICH IMPACTS UPON THE EFFICACY OF CERCLA BECAUSE OF THE NECESSITY OF A UNIFORM INTERPRETATION OF THIS FEDERAL STATUTE.

The substantial importance of this issue is not only shown by the significant number of conflicting federal circuit court decisions, but also by the mere number and breadth of the organizations that filed amicus briefs before the Wisconsin Supreme Court in this case. Approximately nine amicus briefs, representing 112 parties and organizations, were filed on behalf of organizations as diverse as the Sierra Club, the National Association of Chemical Recyclers, the American Petroleum Institute, the Wisconsin Department of Natural Resources and the Wisconsin Attorney General, as well as numerous state and national businesses.

CERCLA is a federal statute. The construction of relief pursuant to various subsections of a federal statute is a question of federal law. The uniform construction of a federal law is a predominant consideration in the adoption of a federal law. Contrary to the insurers' assertions, petitioners are not seeking to interfere with state insurance contract law. The Wisconsin Supreme Court relied, as have other federal circuit courts, on a construction of CERCLA, based upon its interpretation of congressional intent, that response costs are solely equitable relief. Petitioners seek review of that construction; petitioners request this Court to determine whether its construction of CERCLA's statutory language and congressional intent agrees with that of the Wisconsin Supreme Court, or that of the District of Columbia Circuit.

The substantial consequences of this decision are not denied by the insurers. Based upon different constructions of response costs pursuant to § 9607(a)(4)(A), insurance

coverage may or may not exist. Thus, depending upon the state or federal jurisdiction where the case is filed, the result may be different, totally destroying any uniformity in CERCLA's application and destroying its effectiveness in promoting the cleanup of hazardous waste sites. The principal purpose of CERCLA was to establish a uniform federal solution to a national crisis which states and localities were unable to solve. Union Gas Co., 491 U.S. at 20-21 (Brennan, J., plurality op.). ("And often those solutions, to be satisfactory, must include a cause of action for money damages.") The decision of the Wisconsin Supreme Court which misconstrues CERCLA defeats that purpose. Accordingly certiorari should be granted to establish a consistent, uniform interpretation of response costs as damages under § 9607 (a)(4)(A).

## CONCLUSION

For the reasons set forth, joint petitioners respectfully request their joint petition for certiorari to the Wisconsin Supreme Court be granted.

Respectfully submitted,

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